PD-0441-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 10/12/2017 5:59 PM
Accepted 10/13/2017 10:42 AM
DEANA WILLIAMSON
CLERK

NO. PD- 0441-17

IN THE

FILED
COURT OF CRIMINAL APPEALS
10/13/2017
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COURT OF CRIMINAL APPEALS

OF TEXAS
AUSTIN, TEXAS

VERA ELIZABETH GUTHRIE-NAIL
Appellant, Petitioner

v.

THE STATE OF TEXAS,
Appellee, Respondent

BRIEF FOR APPELLANT, PETITIONER

On Petition for Discretionary Review From
Cause No. 05-17-00030-CR
COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS, TEXAS

On appeal from Cause Number 401-80635-2012
in the 401st Criminal District Court
of Collin County, Texas
Honorable Mark J. Rusch, Judge Presiding

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

On the 12th day of September, 2012 before the Honorable Mark J. Rusch, the Defendant, Vera Elizabeth Guthrie Nail, entered a plea of guilty to the charge of conspiracy to commit capital murder contained in Count II of the indictment. (RR: Vol. Plea and Sentencing p. 10) Several days prior to the change of plea and enter of a guilty plea Appellant had entered a plea of not guilty to Count I of the indictment charging her with Capital Murder and Count II of the indictment charging her with Conspiracy to Commit Capital Murder. A jury was impaneled and evidence was presented. The trial was stopped when the State and Defense agreed to enter into a plea bargain agreement. The Court found the Defendant guilty and found that her plea of guilty was made freely, voluntarily, knowingly and competently following a plea bargain agreement. The Court sentenced the Defendant to 50 years confinement in the Institutional Division of the Texas Department of Criminal Justice pursuant to the plea bargain agreement. (RR: Vol. Plea and Sentencing p.15)

The original judgment in the case entered on September 24, 2012 recited "N/A" in the space provided for "Finding on Deadly Weapon." The trial court subsequently signed a judgment nunc pro tunc listing the "Findings on Deadly Weapon" as "Yes, a Firearm" on December 4, 2012. The Court of Appeals

affirmed the entry of the judgment nunc pro tunc conviction in an opinion delivered on January 8, 2014.

The Court of Criminal Appeals reversed this Court's judgment on the ground Appellant was entitled to a hearing before entry of an adverse judgment nunc pro tunc, and the record was not clear whether the trial court had made a deadly weapon finding at the time of trial. *See Guthrie-Nail v. State*, 506 3d 1, 7 (Tex. Crim. App. 2015)

The Court of Criminal Appeals remanded the case to the trial court so that the trial court could conduct a hearing to determine when the trial court had actually made the deadly weapon finding. On December 16, 2016, after bench warranting Appellant back from prison, the trial court conducted the hearing in cause no. PD-0125-14. The trial court concluded the hearing by stating "The affirmative finding stands, as far as I am concerned, and it will stand until the Court of Criminal Appeals tells me to take it off." See Reporter's Record "Hearing" pp. 1-26.

Appellant filed her notice of appeal to appeal the trial judge's statements at the hearing as to whether his actions were discretionary or ministerial. The Court of Appeals assigned a new case number (05-17-00030-CR) to this case on appeal. The Court of Appeals dismissed the appeal on March 28, 2017. Petitioner timely

filed a motion for rehearing on March 31, 2017. The Court of Appeals denied the motion for rehearing on April 12, 2017.

SUMMARY OF ISSUES

In the first two issues the Petitioner argues that the Court of Appeals erred when it dismissed this case for want of jurisdiction because there was 'no written appealable order.' Petitioner argues that the original judgement, nunc pro tunc, provided the Court of Appeals with a written appealable order. Petitioner further argues that the Court of Appeals erred in giving this appeal an new cause number and then stating there was no written order where the remand to the trial court and subsequent notice of appeal was a continuation of the original appeal in the Court of Appeals No. 05-13-00016-CR. In the third issue, Appellant argues that the Court of Appeals erred when it dismissed this cause for want of jurisdiction stating there was no appealable order which if stands, allows the Court of Appeals and the trial court to deny Petitioner due process of law in the continuing exercise of her right to appeal the trial court's rationale for entering a defective order nunc pro tunc adding a deadly weapon finding to the judgment.

GROUNDS FOR REVIEW NOS. 1 AND 2

1. **The Court of Appeals erred in dismissing this case for want of jurisdiction, because 'no written appealable order' existed when in fact the original judgment, nunc pro tunc, provided the Court of Appeals with a written appealable order.**

2. **The Court of Appeals erred in giving this appeal a new cause number and then stating there was no written appealable order where the remand to the trial court and subsequent notice of appeal was a continuation of the original appeal in Court of Appeals No. 05-13-00016-CR**

ARGUMENT

(These two issues are presented together as each relies on the same facts.)

On the 12th day of September, 2012 before the Honorable Mark J. Rusch, the Defendant, Vera Elizabeth Guthrie Nail, entered a plea of guilty to the charge of conspiracy to commit capital murder contained in Count II of the indictment. (RR in PD-0125-14: Vol. Plea and Sentencing p. 10) Several days prior to the change of plea and enter of a guilty plea to Count II of the indictment, Appellant had entered a plea of not guilty to Count I of the indictment charging her with Capital Murder and Count II of the indictment charging her with Conspiracy to Commit Capital Murder. A jury was impaneled and evidence was presented. The trial was stopped when the State and Defense agreed to enter into a plea bargain agreement. The Court found the Defendant guilty and found that her plea of guilty

was made freely, voluntarily, knowingly and competently following a plea bargain agreement. The Court sentenced the Defendant to 50 years confinement in the Institutional Division of the Texas Department of Criminal Justice. (RR in PD-0125-14:Vol. Plea and Sentencing p.15)

The original judgment in the case entered on September 24, 2012 recited "N/A" in the space provided for "Finding on Deadly Weapon." The trial court subsequently signed a judgment nunc pro tunc listing the "Findings on Deadly Weapon" as "Yes, a Firearm" on December 4, 2012. The Court of Appeals affirmed the entry of the judgment nunc pro tunc conviction in an opinion delivered on January 8, 2014 in No. 05-17-00030-CR. In PD-0125-14 this Honorable Court reversed the Court of Appeals and remanded this cased back to the trial court for a hearing.

Appellant submits that when the Court of Criminal Appeals remanded the appeal in PD-0125-14 and Court of Appeals No. 05-13-00016-CR to the 401st Judicial District Court in Collin County for the trial court to conduct a hearing on issues raised in entering a judgement nunc pro tunc adding a deadly weapon finding in *Thornton v. State*, 2017 WL 908629 opinion delivered May 9, 2017 (Tex. Ct. App.-Dallas 2017) the Fifth Court of Appeals at Dallas wrote in an unpublished opinion: The Court of Criminal Appeals concluded that the record

was “far from conclusive” as to whether a deadly weapon finding was made at or before the time the trial court signed the written judgment and remanded the case for a hearing in the judgment nunc pro tunc, specifically concerning whether the judge made a deadly weapon finding in referring this Nail case on appeal. Petitioner submits that she still retained the right of review as to the trial judges’ statement at the hearing as to whether the judgment nunc pro tunc was a valid and legal method of adding a deadly weapon finding. See *Blanton v. State*, 369 S.W.3d 894 (Tex. Crim. App. 2012) The notice of appeal given by Petitioner was a continuing review of the case for appellate purposes.

Petitioner’s counsel called the Court of Criminal Appeals to determine what review or further appellate review could be pursued after the remand hearing in the trial court, because the several opinions rendered in remanding this case for a trial court hearing did not contain any instructions as to how the case would proceed after the trial court hearing. Counsel was advised orally that it would then go to the Court of Appeals. This is the reason why a separate notice of appeal was filed by Petitioner on the date of the hearing. This was necessary to bring the evidence or reasons for the nunc pro tunc deadly weapon judgment back to the Court of Appeals. Now the Court of Appeals, after assigning a new cause number to the appeal, has ruled that there was no appealable order in dismissing the appeal

for want of jurisdiction. In *Harkcom v. State*, 484 S.W. 3432 (Tex. Crim. App. 2016) it was held that:

"A defendant notice of appeal is timely filed if it is filed within 30 days after the day the sentence is impose or suspended in open court or, if the defendant has file a timely motion for new trial, within 90 days after the day the sentence is imposed. Notice must be given in writing and filed with the trial court clerk. Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order.

1. The Texas Rules of Appellate Procedure were amended in 2002 to prevent trivial, reparable mistakes or defects from divesting appellate court of the jurisdiction to consider the merits of both state and defense appeals in criminal cases. *Few,* 230 S.W.3d at 187. The Rules of Appellate Procedure should be construed reasonably, yet liberally, so that the right to appeal is not lost by imposing requirements not absolutely necessary to effect the purpose of a rule. *Id.* at 189 (citing *Verburft v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997)
2. A person's right to appeal a civil or criminal judgment should not depend upon traipsing through a maze of technicalities. *Id.* at 190. We do not require "magic words" or a separate instrument to constitute notice of appeal. All that is required is that the notice be in writing, be submitted within thirty days or ninety das after sentencing, as appropriate, and show the party's desire to appeal from the judgment or other appealable order."

At the evidentiary or trial court hearing, counsel for Petitioner, Counsel for the State and the judge of the trial court recited the requested information into the record in the presence of Petitioner as to the entry of the deadly weapon finding in the judgment nunc pro tunc.

In summary, the recitations placed on the record on December 16, 2016 are as follows:

(JUDGE): The Court of Criminal Appeals has sent this matter back to me because they want me to conduct a hearing. And best I can tell, the Court of Criminal Appeals wants to know if I intended to make a affirmative finding of the use of a deadly weapon at the time of the Defendant's plea, if I knew that I had the discretion to not make an affirmative finding, or if I felt that I had or was compelled to make an affirmative finding. That's my understanding of why we are here.

Do you guys have a different understanding? And I'll start with the State of Texas.

MR. DOBINYANSKI: The State does not, Judge. I think you nailed it.

THE COURT: From the Defense?

MR. TATUM: Maybe a little different interpretation, Your Honor.

THE COURT: Well, what's your interpretation?

MR. TATUM: I don't dispute what you said. I think additionally what the concurring opinion stated, also, I believe the Court made a finding of what should have been done rather than correct a clerical error. In other words - -

THE COURT: Well, if I intended at the time of the hearing to make an affirmative finding and I failed to say so on the record, or if when I signed the judgment I missed it in a box and I meant for it to be there, then it would be a clerical error. I understand what you're saying.

MR. TATUM: And we would dispute that interpretation in one sense. I'm not arguing what you're saying. I'm just saying that for the representation of and advocacy for Ms. Nail that would be our interpretation; in other words, it just wasn't done but now when it was done, it was done under the idea that it should have been done but wasn't, and inquiring that the separate concurring opinion was stated. And so we would just add on or supplement to what you said.

THE COURT: The separate concurring opinion would not be the opinion of the Court, number one.

Number two, let me make this statement to the Court of Criminal Appeals. This is me talking to them; not me talking to you all.

Part of the reason - - in fact, the main reason, there was no hearing with respect to whether or not I was going to grant a nunc pro tunc - - well, let me back up.

The opinion of the Court of Criminal Appeals, the opinion of the Court, is that a hearing is required if I am going to enter a nunc pro tunc that adversely affects or impacts the Defendant. I'm familiar with that line of case law.

. . . .

At the time of the plea, I was aware of many facts that the jury had heard and some heard outside the jury's presence, and I know exactly what had happened outside the jury's presence immediately before the Defendant's negotiated plea was entered. I know that we recessed in light of certain testimony that I said was going to be admissible. And I understand the potential legal and non-legal implication of that testimony of the co-defendant, who had pled guilty to the actual shooting, that that would have generally on a jury. And it certainly, if he had testified in the jury's presence a certain way, certainly would have shored up any concerns, holes or lack of evidence with respect to the Defendant's guilt to the charge of capital murder. And the State having waived the death penalty, the sentence would have been, in the event she was convicted of that charge, life without the possibility of parole.

I ask routinely of defendants when they are pleading guilty if they are pleading guilty because they are, in fact, guilty and for no other reason. And if I get an affirmative answer, then I ask routinely the next question, because I'm aware of the line of cases that says that question is insufficient to do certain things, and so I ask the question, did you commit this crime just as it is set out in . . . whether it's a particular count or paragraph or the indictment.

I asked that question in this case. I have a specific recollection of that and the Defendant's affirmative response to that. I know from my personal experience as the judge of the 401st that plea bargain agreements don't always reflect whether an affirmative finding was going to be made or not, and I know that that has changed since this case has gone up and things that were done somewhat sloppily in the past aren't done sloppily anymore.

At the time of Ms. Guthrie-Nail's plea I can't recall any time I've admonished someone as to the parole consequences of an affirmative finding, and I believe it improper and unethical for me to do that. So the Court of Criminal Appeals' apparent surprise that I did not admonish that or the acknowledgment of that admonition would be news to me. Again, I was ignorant that I should admonish someone as to the potential parole consequences, other than what is already in my written plea admonitions.

. . .

Ultimately, all kinds of appellate courts, intermediate and the Court of Criminal Appeals, made sure everybody understood the trial judge does not have to make a finding. I knew that before I became a judge. I was aware of it at the time of the plea.

I asked the question of Ms. Guthrie-Nail so that the evidence would support such a finding, if it was further necessary, given the written documents admitted in this case in connection with the plea that one could interpret as constituting a judicial confession. But I want to go over it again so that the appellate courts don't have any question.

If I failed to make an affirmative finding at the time of the plea, the fault lies with nobody but me for not saying it out loud. I do believe I found her guilty exactly as charged in the indictment or in Count II of the indictment. And it is my habit, practice, and routine that that statement means I'm making an affirmative finding if that paragraph or that count contains an affirmative finding allegation and if someone has said certain things in front of me, unless that affirmative finding is specifically waived in a plea bargain agreement.

I know I didn't have to make it. I knew at the time I didn't have to make it. It was my intention to enter that finding. It was my intention to say it when I said guilty as charged to that count. I simply missed it on the judgment when I signed it. I thought it was a scrivener's error that that finding just wasn't made.

. . . .

I simply made the finding that I believe I should have made or should have been contained in the judgment when I originally signed it.

So the answer to the learned justices of the Court of Criminal Appeals is, yes, Mark Rusch knew he had the ability, the discretion, to not make an affirmative finding at the time of the plea. Mark Rusch intended to make that affirmative finding at the time of the plea, and Mark Rusch thought he was doing that by pronouncing guilt as charged in the indictment. The fact that I perhaps didn't say the right magic words to the satisfaction of the appellate courts of this state is duly note, and it won't happen again.

. . .

I understand there is no requirement under Texas law that I enter an affirmative finding. I understand that I have the discretion to not make an affirmative finding, even in the case where that affirmative finding is an essential element of what makes the crime a felony.

. . .

But I knew that that gun had been discharged repeatedly, both at the deceased's girlfriend and at the deceased. There's no question a deadly weapon was used. The whole purpose of the exercise was so that the deceased would be killed. And the Defendant, based on her plea and the evidence at the time, and I didn't factor it into the equation of finding her guilty, but the Defendant played a very central role to this man being killed with a firearm.

So yeah, I knew I had the discretion to not enter it, but there was no way I was going to exercise that in favor of the Defendant. It was a brutal killing. It was an unnecessary killing. There's no question a firearm was used, and I certainly intended to make that finding, absent it being waived and there was no evidence that it was waived.

Do we need to do anything else for the Court of Criminal Appeals from the State's side of the room?

MR. DOBINYANSKI: No, sir.

THE COURT: From the Defense side of the room?

MR. FRANKLIN: Judge, I would just like to state into the record that parole did become an issue in this case, and that's why we're here.

THE COURT: Well, parole lies within the exclusive purview of the executive branch of the government, not with judicial branch of the government.

MR. FRANKLIN: Well, if that's the case then we never should have done the nunc pro tunc in the first place. If Ms. Nail got parole, it's solely in their domain, then we should have left it the way it was. The fact of the matter is she was eligible for parole shortly after she went into prison because she had done so much back time in Collin County. When the authorities in Frisco, the police agency that investigated this case, because aware of it, they were upset. They called the district attorney's office, and that's when the district attorney's office looked into it and discovered that there was no finding of deadly weapon.

There were three opportunities to make a finding of deadly weapon or to produce it in sentencing, that was with the plea bargain agreement, that was with pronouncing a finding of deadly weapon at the sentencing, and putting it in the judgment. The judgment was prepared by the district attorney's office. Just like the plea bargain was. There's no indication in there that there should be a finding of deadly weapon. This is a conspiracy offense. It doesn't make any difference if the conspiracy was carried out; it's a conspiracy offense. It doesn't carry- -

THE COURT: If legally you mean the fact that she pled to conspiracy, the fact that the crime was committed doesn't make any difference, then I would agree with you with that statement.

MR. FRANKLIN: So the judgment prepared by the district attorney's office specifically indicated that there was no finding of deadly weapon. The Court, with all of its experience, signed that judgement, and that's it. The judgment was be signed, the plea bargain was done, and none of those contained any affirmative finding of a deadly weapon.

The board of pardons and paroles looked at the - - they had the indictment. They looked at the indictment. They saw there was a deadly weapon in the indictment, but they also looked at the judgment that did not have a finding - -

. . . .

MR. FRANKLIN: Well, Judge, I think that we're talking about something that should have been done but wasn't done, and that Ms. Nail is now suffering the consequences of something that should have been done by all parties involved, of course, except us because we were looking at what was going on. But all parties involved, the DA and the judge, should have done certain things, but they didn't, and her sentence is appropriate to a conspiracy, and it would be an unaggravated offense without a specific finding of deadly weapon.

. . .

MR. TATUM: The Defense's position is it was not a nunc pro tunc. It was what should have been which is not the test for nunc pro tunc. We claim it was not a clerical error, and that's what we have to do to advocate for her position.

. . . .

MR. TATUM: I think what he's trying to say, Judge, in our plea bargain discussions we never discussed deadly weapon with the State. It just never was brought up in our discussion. We just wanted the record to reflect that we weren't told it was going to be or wasn't told it was going to be. It just never was brought up, period, between the lawyers.

MR. DOBINYANSKI: When you plead guilty to the offense exactly as alleged in the indictment, it contained the deadly weapon language. That's what she was pleading to. That's why it was always part of what should result here.

THE COURT: And had I been clear at the time of sentencing none of this would be here, so I owe you all an apology for my lack of clarity, in addition to my apology both to the Dallas Court of Appeals for the time they've had to spend on this matter and the Court of Criminal Appeals for the time that they've had to spend on this matter. The guilt lies squarely with me, and I accept that.

. . .

That will conclude this hearing - - well, let me say this: The affirmative finding stands, as far as I am concerned, and it will stand until the Court of Criminal Appeals tells me to take it off.

Now, we're done. You guys are excused.

(Proceedings adjourned.)

Petitioner submits that she still has a right of review on appeal of the recitations made at the hearing to determine if a proper and valid deadly weapon finding was made when the trial court signed the judgment nunc pro tunc. This right of review would be a continuation of the right of appeal from the written judgment nunc pro tunc. There was no other apparent way or procedure to move the case out of the trial court to the appellate court (Court of Appeals-Fifth District at Dallas) as orally represented to appellate counsel by the Clerk of the Court of Criminal Appeals before the trial court hearing or back directly to the Court of Criminal Appeals) unless a notice of appeal was filed with the Collin County District Clerk. The Collin County District Clerk was not going to send the case for appellate review without a notice of appeal. The Court of Appeals -Fifth District assigned a new cause number to the case. Petitioner argues it was done in error and should have been refiled under its original appellate cause number. In either event, the written appealable order was and always has been the written original judgment nunc pro tunc.

When the Court of Appeals requested a written order from which the appeal was made the Collin County District Clerk sent only a docket sheet entry. Petitioner submits that the Court of Appeals erred in dismissing the appeal for want of jurisdiction. Additionally, Petitioner cites to T.R.A.P. 27.3 to support her argument that review after the evidentiary hearing on the issue of deadly weapon finding was a continuation of the original appeal. This rule applies to civil cases on appeal but it is presented only to argue Petitioner's position that this is a continuation of the original appeal.

Petitioner submits that the Court of Appeals-Fifth District at Dallas erred in dismissing Appellant's appeal to the Court of Appeals after the Court of Criminal Appeals remanded the original appeal to the trial court for the trial judge to put on the record his explanation as to the procedural process and facts of Appellant's plea of guilty during the jury trial, and subsequent entry of a judgement nunc pro tunc adding a deadly weapon finding after the original judgment did not contain such a finding. The Court of Appeals, after receiving a notice of appeal from the trial court's hearing as requested by the Court of Criminal Appeals, asked for the written order and requested letter briefs on its jurisdiction. The letter was apparently sent to Petitioner in prison.

At this time the Court of Appeals apparently believed that Appellant was acting pro-se when in fact she was represented by appointed counsel at the hearing and reappointed after the hearing to continue the appellate process. Counsel was never relieved by any court from continuing to represent Appellant in this matter. The Court of Appeals did not receive a response. The Collin County District Clerk was ordered to provide the Court of Appeals with a written order making an affirmative finding of a deadly weapon or verification that no order existed. The Clerk only sent a general docket entry, but did not send a written order; when in fact the Clerk was in possession of the original judgment nunc pro tunc.

Appointed counsel by chance had checked on the status of the appeal and learned of what was occurring and sent a letter to the Court of Appeals explaining that the trial court was allowing him to continue with this appeal and that the appeal related to the original entry of the nunc pro tunc deadly weapon judgment.

The Court of Appeals dismissed the appeal citing the case of *Nikrasch v. State*, 698 S.W.2d 443, 450 (Tex. App.-Dallas, 1985 no pet.). This case dealt with an appellant who tried to appeal two convictions with only one record on appeal that applied to only one conviction, so there was no written judgment to appeal in one of the convictions. Petitioner does not complain that there needs to be a

judgment or appealable order for the notice of appeal to confer jurisdiction on the Appellate Court.

This argument does not apply in this case, because there existed an original judgment nunc pro tunc adding a deadly weapon finding that this Court of Appeals had previously heard on appeal in which the Court of Appeals had jurisdiction, and of which the trial court 'ratified' or explained the reason for the nunc pro tunc which was included in the reporter's record. The trial court did not sign a new nunc pro tunc but reaffirmed the original. The Court of Appeals had previously issued an opinion affirming the original nunc pro tunc judgement that was the subject of a petition for discretionary review to the Court of Criminal Appeals that remanded the case to the trial court for further judicial explanation.

If the Court of Appeals is correct, then this case should have been sent back to the Court of Criminal Appeals directly bypassing the Court of Appeals since this Honorable Court requested further information from the trial judge. If the Court of Appeals is in error, because the Collin County District Clerk erred in its interpretation of the Court of Appeals order in not providing the Court of Appeals with the original judgment nunc pro tunc then the Court of Appeals opinion should be reversed and this case should be sent to the Court of Appeals to

review the trial court's explanation in light of the several opinions by the Court of Criminal Appeals discussing the merits of the case.

III.

3. The Court of Appeals erred in dismissing this cause for want of jurisdiction stating there was no appealable order which if stands allows the Court of Appeals and the Trial Court to deny Appellant due process of law in the continuing exercise of her right to appeal the trial court's rationale for entering a defective order nunc pro tunc adding a deadly weapon finding to the judgement.

ARGUMENT

Petitioner adopts the facts and arguments stated in the previous grounds as if set out verbatim. Petitioner further argues that the Court of Appeals in finding that it did not have jurisdiction has denied Petitioner due process of law as guaranteed by the Fifth and Fourteenth Amendment to the United States Constitution and or Article 9 and 10 of the Texas Constitution. Petitioner has a right of review of the judgment nunc pro tunc adding a deadly weapon finding and the subsequent rationale of the trial court; which was made part of the record pursuant to the remand order. See *Blanton v. State,* supra.

The Court of Appeals had previously issued an opinion affirming the original nunc pro tunc judgement that was the subject of a petition for discretionary review to the Court of Criminal Appeals that remanded the case to

the trial court for further judicial explanation. If the Court of Appeals is correct, then this case should have been sent back to the Court of Criminal Appeals directly bypassing the Court of Appeals since this Honorable Court requested further information from the trial judge.

If the Court of Appeals is in error, because the Collin County District Clerk erred in its interpretation of the Court of Appeals order in not providing the Court of Appeals with the original judgment nunc pro tunc then the Court of Appeals opinion should be reversed and this case should be sent to the Court of Appeals to review the trial court's explanation in light of the several opinions by the Court of Criminal Appeals discussing the merits of the case.

In either situation, Appellant was denied due process of law on appeal because: She was in prison when the Court of Appeals asked her to explain how the Court of Appeals had jurisdiction in a complicated appeal after remand and was not pro se, but represented by counsel who was not originally noticed by the Court of Appeals and denied her right to appellate review of the trial judges explanation as requested by the Court of Criminal Appeals as to whether the trial judge's actions were in fact clerical or discretionary in regard to the entry of the nunc pro tunc judgment.

Appellant further submits that she was denied due process of further review, because if the Court of Appeals is correct in its holding then her right of review was terminated by the trial court not entering its findings in written form (actually there was a written form in that the reporter transcribed the hearing and filed it with the District Clerk) or by the Clerk not sending the correct document to the Court of Appeals or by the case not being returned to the Court of Criminal Appeals for final review of the trial judges explanation. *See Guthrie-Nail v. State*, S.W.3d , 2015 WL 544962 (Tex. Crim. App. Sept. 16, 2015)

Appellant/Petitioner requests that this Honorable Court sustain Appellant/Petitioner's issues on Petition for Discretionary Review and hold that (1) the proper remedy is to return the case to the Court of Criminal Appeals for further review of the trial court's statements about entering a nunc pro tunc deadly weapon finding or (2) the Court of Appeals erred in dismissing Appellant's appeal of the trial court's recitations in the record as to whether a proper nunc pro tunc judgement of a deadly weapon was authorized by law and hold that the Court of Appeals has jurisdiction.

PRAYER

For the reasons stated, it is respectfully submitted that the Court of Criminal Appeals should review the issues of error and then sustain the issues raised, set aside or hold void the Court of Appeals opinion and docket this case for direct appeal and or the Court of Criminal Appeals should order that the case should be returned to its jurisdiction for further review after the evidentiary hearing conducted by the trial court.

Respectfully submitted,

/S/ John Tatum

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CERTIFICATE OF SERVICE

I, JOHN TATUM, do hereby certify that a true and correct copy of the foregoing Brief for Appellant/Petitioner was delivered to the Honorable Greg Willis, District Attorney for Collin County, Texas at 2105 S. McDonald Suite 324, McKinney, Texas 75069 and State's Counsel in Austin, Texas on this 12th day of October, 2017.

/S/ John Tatum
John Tatum

CERTIFICATE OF SERVICE

The undersigned attorney for Appellant/Petitioner certifies that a true and correct copy of the foregoing brief was mailed , postage prepaid, to Vera Elizabeth Guthrie Nail , TDCJ# 01813126 at the Crain Unit, 1401 State School Road, Gatesville, TX 76599-2999 by U.S. Mail this the 12th day of October, 2017.

/s/ John Tatum
John Tatum

CERTIFICATE OF COMPLIANCE OF WORD COUNT PURSUANT TO APPELLATE RULE OF PROCEDURE 9.4

I certify that this document has 5,529 words pursuant to the definitions of length and content in Rule 9.4. (C)(i)(2)(D)

A. Case Name: Vera Elizabeth Guthrie - Nail
B. The Court of Criminal Appeals: PD- 0441-17
C. The Type of Document: Brief on Petition for Discretionary Review
D. Party for whom the document is being submitted: Appellant
E. The Word Processing Software and Version Used to Prepare the Brief: Word Perfect X4
Copies have been sent to all parties associated with this case.

/s/ John Tatum 10 /12 /2017
(Signature of filing party and date)

CERTIFICATE OF COMPLIANCE

I certify that this submitted e-mail attachment to file Petition for Discretionary Review complies with the following requirements of the Court:

1. The petition is submitted by e-mail attachment;

2. The e-mail attachment is labeled with the following information:

A. Case Name: Vera Elizabeth Guthrie- Nail
B. The Appellate Case Number: PD- 0441-17
C. The Type of Document: Petition for Discretionary Review
D. Party for whom the document is being submitted: Appellant
E. The Word Processing Software and Version Used to Prepare the Brief: Word Perfect X8

3. Copies have been sent to all parties associated with this case.

/s/ John Tatum 10/12 /17
(Signature of filing party and date)

John Tatum
(Printed name)

John Tatum, Attorney at Law

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